

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF THE ADOPTION  
OF AMENDMENTS TO THE KITSAP  
COUNTY SHORELINE MANAGEMENT  
MASTER PROGRAM,

KITSAP COUNTY,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent,

and

E. SHIPPEN WILLING,

Intervenor.

SHB No. 83-18

ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT

Appellant's Motion for Summary Judgment came before the Shorelines Hearings Board by written argument on consent of the parties. Respondent filed documents opposing the motion; intervenor filed documents supporting the motion. Replies to respondent's documents

1 were also filed.

2 Having considered the documents pertinent to the motion, and the  
3 file and record herein, and finding no genuine issue as to any  
4 material fact, the Board makes the following decision.

5 The undisputed facts show that WAC 173-14-060(2) relating to  
6 guidelines for aquaculture regulations was amended by respondent's  
7 action filed with the Code Reviser on October 17, 1980. WSR  
8 80-15-072. The implementation of the amended regulation was provided  
9 in subsection (b) thereof.

10 In 1981, appellant County proceeded to make the changes to its  
11 Shoreline Master Program (SMP) to implement the state guidelines.  
12 After the proposed amendment to the aquaculture use regulations in the  
13 SMP was formulated, appellant circulated a proposed Negative  
14 Declaration. Thereafter, on March 25, 1982, a Declaration of  
15 Non-significance was signed. On June 7, 1983, appellant adopted the  
16 proposed amendment to the SMP. On November 17, 1982, respondent held  
17 a public hearing on appellant's amendments. During the hearing,  
18 respondent indicated an intent to modify the amendment adopted by the  
19 County. In response to its inquiry, appellant was notified that the  
20 submission of revised amendments was not expected. Respondent  
21 indicated its intention to adopt amendments to appellant's SMP without  
22 further submittals from appellant.

23 The adoption proceedings were continued a number of times until  
24 finally scheduled for March 16, 1983. During the hiatus, appellant  
25 reviewed respondent's modifications to the proposed aquaculture

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1 amendment. On November 23, 1982, appellant withdrew its DNS in a  
2 comment noted on a Declaration of Significance prepared by appellant  
3 assigning the Director of the Department of Ecology as the applicant.

4 By letter dated December 17, 1982, respondent notified appellant  
5 of its intent to make its own threshold determination because the  
6 proposed amendments were a new proposal for which respondent was the  
7 lead agency. Appellant did not agree to allow respondent to assume  
8 lead agency status.

9 Respondent prepared and circulated a proposed declaration of  
10 non-significance. By letter dated March 3, 1983, appellant claimed  
11 continued lead agency status for itself and, in addition, contested  
12 the finding of non-significance.

13 On March 16, 1983, respondent adopted its proposed changes to the  
14 Kitsap County Shoreline Master Program. The adoption order was filed  
15 on March 24, 1983. WSR 83-08-002. The adoption was appealed to this  
16 Board on April 12, 1983. After hearing continuances requested by the  
17 parties on various occasions, this motion came before the Board.

18 This matter turns on the procedure to be followed when adopting  
19 amendments to provisions of a shoreline master program affecting  
20 shorelines of statewide significance under the Shoreline Management  
21 Act (SMA). The authority to adopt amendments affects the lead agency  
22 determination under the State Environmental Policy Act (SEPA).

23 RCW 90.58.090 provides the procedure to be followed in the initial  
24 adoption of master program by local government. Subsection 2 thereof  
25

1 provides the procedure to be used relating to shorelines of statewide  
2 significance:

3 Master programs or segments thereof shall become  
4 effective when adopted or approved by the department  
5 as appropriate. Within the time period provided in  
6 RCW 90.58.080, each local government shall have  
7 submitted a master program, either totally or by  
8 segments, for all shorelines of the state within its  
9 jurisdiction to the department for review and  
10 approval.

11 . . . . .

12 (2) As to those segments of the master program  
13 relating to shorelines of state-wide significance the  
14 department shall have full authority following review  
15 and evaluation of the submission by local government  
16 to develop and adopt an alternative to the local  
17 government's proposal if in the department's opinion  
18 the program submitted does not provide the optimum  
19 implementation of the policy of this chapter to  
20 satisfy the state-wide interest. If the submission  
21 by local government is not approved, the department  
22 shall suggest modifications to the local government  
23 within ninety days from receipt of the submission.  
24 The local government shall have ninety days after it  
25 receives said modifications to consider the same and  
26 resubmit a master program to the department.  
27 Thereafter, the department shall adopt the  
resubmitted program or, if the department determines  
that said program does not provide for optimum  
implementation, it may develop and adopt an  
alternative as hereinbefore provided.

19 The provision requires that respondent first review and evaluate local  
20 government's submission. If not approved, respondent shall suggest  
21 modifications to the local government. Local government has an  
22 opportunity to resubmit a master program, or segment thereof.  
23 Respondent may then adopt the resubmitted program or, if  
24 unsatisfactory, it may develop and adopt an alternative master program.

1 With respect to amendments to master programs or segments thereof,  
2 respondent has adopted WAC 173-19-060:

3 At any time after adoption or approval of the master  
4 program by the department, local government may  
5 pursuant to RCW 90.58.190 propose additions,  
6 deletions, or modifications to the master program  
7 deemed necessary by local government to reflect  
8 changing local circumstances, new information, or  
9 improved data. A revision to the master program  
10 shall be consistent with chapter 90.58 RCW and  
11 chapter 173-16 WAC, and shall be submitted to the  
12 department for its review and formal action. No such  
13 revision submitted to a master program by local  
14 government shall become effective until thirty days  
15 after the department's order adopting the revision  
16 has been filed with the code reviser.

17 The regulation provides for additions, deletions, or modifications to  
18 a master program pursuant to RCW 90.58.190. The statutory provision,  
19 though not directly addressing changes to an existing master program,  
20 does not exclude it.

21 Pursuant to RCW 90.58.190, respondent must follow the 90 day  
22 review and resubmission procedure on master program revisions. This  
23 procedure would be consistent with the statute and its legislative  
24 intent. If there is ambiguity in the statute, the legislative intent  
25 can be confirmed in the Journal of the Senate. (See pp 1409-1410, May  
26 4, 1971.)

27 Respondent did not adopt the master program revisions as proposed,  
nor did it provide appellant with 90 days to resubmit its revisions.  
Instead, respondent adopted markedly different revisions for the  
aquaculture segment or portion of appellant's master program involving  
substantial deletions to the original proposal. In so doing,  
respondent did not proceed consistently with RCW 90.58.090(2). It did

1 not give appellant the opportunity to resubmit its revisions. Only  
2 after such opportunity has passed does respondent vest with the  
3 authority to adopt an alternate revised master program.<sup>1</sup>

4 It follows from the foregoing analysis that appellant was and is  
5 the "lead agency" for SEPA compliance. WAC 197-10-203 and 205.  
6 Respondent did not have jurisdiction to adopt regulations and,  
7 therefore, it could take no "action" on its own.<sup>2</sup> Appellant did not  
8 agree to relinquish its lead agency status on its proposed revision;  
9 there was no assumption of lead agency status (WAC 197-10-345) by  
10 respondent on the proposed revision.

11 We conclude that respondent's action adopting revisions to the  
12 aquaculture provisions of the Kitsap County Master Program on Order  
13 DE 83-11 dated March 16, 1983, and as filed in WSR 83-08-002 is  
14 invalid because the adoption exceeded the statutory authority of the  
15 agency. RCW 90.58.180(4)(b).

16  
17 1 Although the foregoing analysis is dispositive of which agency may  
18 act on the revisions in this instance, there remains some question as  
19 to whether respondent (if it had the authority) could adopt a master  
20 program "segment" in the manner that it did. The procedure used to  
21 adopt or deny adoption of a master program, or portions thereof, are  
22 set forth in WAC 173-19-062 and -064. The statutes and regulations  
23 refer to master programs, or "segments" thereof (RCW 90.58.090), or  
24 "portion" thereof (RCW 90.58.120, WAC 173-19-064). A revised master  
25 program segment with substantial changes made by respondent must  
26 continue to meet the adoption criteria of the SMA and the  
27 Administrative Procedure Act (ch. 34.04 RCW). At some point, a change  
to a revision becomes a new proposal. Respondent admits as much in  
this case. As such, the rule was probably also adopted inconsistent  
with statutory rule-making procedures.

2. In a proper case, respondent could, and perhaps must, become the  
lead agency for an action relating to rule making under the SMA.

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1 The Motion for Summary Judgment is granted and the matter is  
2 remanded to the Department of Ecology to formally rescind its Order  
3 DE 83-11, and to provide appellant Kitsap County with an opportunity  
4 to resubmit its proposed master program revisions.

5 DATED this \_\_\_\_ day of December, 1983.

6 SHORELINES HEARINGS BOARD

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